passed under the contract, as upon a rescission, depends upon a plaintiff's right to put an end to the contract by repudiating it without liability therefor. It is well settled that a party, himself at the time in default, cannot elect to rescind a contract upon breach by the adverse party going to the whole of the consideration;[4] but it by no means follows that, in the principal case, plaintiff's prior breach caused him to be in default at the time of the bringing of this action. The breach of a contract does not *ipso facto* terminate it, but only gives a right to elect to rescind. This right of election may be waived, either by failure to exercise it within a reasonable time, or by action indicating an intention not to exercise that right. When, after plaintiff's breach, the foundry company sought an injunction against him to compel performance, it thereby unequivocally elected to waive the breach as a ground for repudiation, and so far as plaintiff's right of rescission is concerned, the breach became entirely immaterial. Since plaintiff's prior breach would not have prevented him from maintaining an action at law, nor, under the decision of this case, does it preclude rescission in a court of equity, the case comes within the established rule, that a prior breach, when waived by the adverse party, will not preclude an election to rescind the contract because of a subsequent breach by the other party.[5]

J. D. R.

CONTRACTS: PAROL EVIDENCE: INTERPRETATION BY EXTRINSIC CIRCUMSTANCES.—In the case of *Alaska Treadwell Gold Mining Company v. Alaska Gastineau Mining Company*[1] the United States Circuit Court of Appeals for the ninth circuit refused to allow parol evidence to explain the meaning of a contract to furnish "a current of not to exceed three hundred electric horse power". In a strong dissenting opinion, Gilbert, Circuit Judge, favored the admission of such evidence to bind the defendant to furnish starting surges of four or five times the general current. He based his dissent on the findings of the trial court that it was the custom of the power companies of the locality to furnish reasonable starting surges where the use of only a named current was contracted for, and that the parties both knew that a heavy starting surge would be necessary to a beneficial use of the current provided for in the contract.

Of course, a usage of trade cannot be given in evidence to relieve a party from his express stipulation, or to vary a written contract which is certain in its terms; but it has a legitimate office in aiding to interpret the language of the parties to a contract.[2] Evidence is admissible to show that the terms in a

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[4] Williston's Wald's Pollock, Contracts, 3rd ed., 345.
[5] Graham v. United States (1911), 188 Fed. 651.
[1] (May 14, 1914), 214 Fed. 718.
[2] Burns v. Sennett & Miller (1893), 99 Cal. 363, 33 Pac. 916; Mil-

written contract, by custom of the trade or locality, have acquired a peculiar meaning, regardless of whether such terms are ambiguous or not.[3]

The principal case should fall under this rule, but the court refused to allow the evidence on the ground that it would be adding to the provisions of a written contract. It is not clear, however, that in such case the court would be varying the contract any more, in construing it, by the aid of local custom, to mean three hundred electric horse power with the necessary starting surges, than in the traditional case where the court held one thousand to mean one thousand two hundred,[4] or the case where a contract to pay a weekly salary for two years was construed to mean weekly only during the theatrical season.[5] Sir George Jessel once remarked that "no amount of evidence could convince him that black was white", but he was reversed on appeal on the ground that he should have admitted evidence that a selvage of dark gray color was what was known to the trade as a white selvage.[6] The terms of the contract involved in the principal case surely have no plainer meaning than those of a contract to pay freight on delivery at a certain rate per pound; yet the court in that case allowed the custom of the trade to bind the carrier to allow three month's discount, thus making a difference of about two pounds in the amount due to him.[7] In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it merely interprets the terms. The fact that the contract as construed by the majority of the court is practically a nullity, adds weight to the dissenting opinion. When a contract is susceptible of a construction in accordance with justice and fair dealing, the court should adopt it.[8]

A. A.

CRIMINAL LAW: DUTY OF THE COURT TO SUBMIT THE QUESTION OF PRESENT INSANITY TO SPECIAL JURY.—In the case of *People v. West*[1] the defendants committed homicide in an attempt to escape from the state hospital for the insane and were convicted and sentenced. One defendant had been sent to the hospital upon the certificate of two surgeons of the United States Navy.

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waukee Ins. Co. v. Palatine Ins. Co. (1900), 128 Cal. 71, 74, 60 Pac. 518; Withers v. Moore (1903), 140 Cal. 591, 74 Pac. 159.

[3] Wigmore on Evidence, § 2463; Browne v. Byrne (1854), 3 El. & Bl. 703, 118 Eng. Repr. 1304; Mitchell v. Henry (1880), L. R. 15 Ch. D. 181, 24 Sol. J. 690; Leavitt v. Kennicott (1895), 157 Ill. 235, 41 N. E. 737; Smith v. Wilson (1832), 2 B. & A. 728, 23 Eng. Com. L. R 319; Newhall v. Appleton (1889), 114 N. Y. 141, 3 L. R. A. 859.

[4] Smith v. Wilson, supra, note 3.

[5] Leavitt v. Kennicott, supra, note 3.

[6] Mitchell v. Henry, supra, note 3.

[7] Browne v. Byrne, supra, note 3.

[8] Noonan v. Bradley (1869), 9 Wall. 394, 407.

[1] (Sept. 4, 1914), 19 Cal. App. Dec. 318.